IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0518

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS HAMILTON MCCLELLAND,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jeffrey H. Langton, Presiding

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STATEMENT OF THE ISSUES

1. Did defense counsel render ineffective assistance when he failed to secure and present the testimony of a witness about the prior inconsistent statement of a key State witness regarding the central issue in Appellant's defense?

2. Did the district court err when it held that Montana Rule of Evidence 608(b) (Rule 608(b)) did not allow the defense to impeach Wendy Tallis's credibility by cross-examining her about dishonest conduct underlying her conviction for improper issuance of bank checks?

3. Did the district court's erroneous Rule 608(b) ruling violate Appellant's right to confrontation under the Sixth Amendment to the U.S. Constitution and Article II, Section 24 of the Montana Constitution?

4. If defense counsel did not properly raise the Rule 608(b) and Confrontation Clause issues, did Appellant receive ineffective assistance of counsel?

5. Did the cumulative errors combine to deprive Appellant of a fair trial?

STATEMENT OF THE CASE

On December 17, 2007, Thomas McClelland (McClelland) was charged by Information with: (1) assault with a weapon, a felony, in violation of Mont. Code Ann. § 45-5-213(1)(a); and (2) criminal mischief, a misdemeanor, in violation of Mont. Code Ann. § 45-6-101(1)(a). (D.C. Doc. 4.)

On March 17, 2009, the State filed a pretrial motion *in limine*. (D.C. Doc. 40.) Relevant here, the State sought to preclude McClelland from mentioning the prior criminal history of State witness Wendy Tallis, specifically her Washington State conviction for improper issuance of bank checks. (D.C. Doc. 40.) McClelland opposed the motion; he acknowledged that the law precluded him from raising her prior conviction, but argued that he could raise the conduct itself as related to her character for truthfulness. (D.C. Doc. 48.) The district court granted the State's motion, finding Rule 608(b) was inapplicable as McClelland "has not shown how the improper issuance of bank checks is an indicator of dishonesty." (D.C. Doc. 50 at 3, attached as Ex. 1.)

A two-day trial by jury took place on March 30 and 31, 2009.[1] Before commencement of trial on March 30, 2009, defense counsel informed the district court that over the weekend he had contacted a witness, Sue Swenson. (3/30/09 Tr. at 8.) Swenson would testify about a prior inconsistent statement by one of the State's witnesses, Corinne Anderson. (3/30/09 Tr. at 8.) Defense counsel had not previously disclosed Swenson as a witness or sought a subpoena for her. Swenson was then scheduled to be interviewed by counsel for the State at 8:30 a.m. before

[1] This was a delay of 469 days between accusation and trial. Because defense counsel did not file a motion to dismiss for speedy trial violation and fully develop the record in district court, however, McClelland cannot raise the issue on direct appeal to this Court. *State v. Lewis*, 2007 MT 16, ¶¶ 15, 21, 335 Mont. 331, 151 P.3d 883.

the second day of trial, but she did not show up. (3/31/09 Tr. at 273.) The district court therefore prohibited McClelland from calling Swenson as a witness. (3/31/09 Tr. at 273-74, attached as Ex. 2.)

The State's witnesses were Mathias Tallis (Tallis), the victim, as well as his wife, Wendy Tallis, and daughter, A.T.; Dr. Robert Naef, who attended Tallis's injuries; Shad Pease, a responding officer; and Corinne Anderson, a neighbor. For the defense, McClelland testified as well as Helen Newberry, his caretaker. The only eye-witnesses to the incident were the Tallises, Anderson, and McClelland.

McClelland asserted a justifiable use of force defense. (3/30/09 Tr. at 93.) The jury found McClelland guilty on both counts. (D.C. Doc. 55.) On the charge of assault with a weapon, the district court sentenced McClelland to a five-year commitment to the Department of Corrections with all five years suspended; on the charge of criminal mischief, the court sentenced McClelland to Ravalli County Detention Center for seven days. (D.C. Doc. 67, attached as Ex. 3.) McClelland's timely appeal followed. (D.C. Doc. 71.)

STATEMENT OF FACTS

On October 27, 2007, the Tallis family installed dirt berms in a portion of Dugout Gulch Road that runs through their property in an effort to divert water off the road into a creek. (3/30/09 Tr. at 102.) As Deputy Pease testified, the berms "were excessive" and "very deep." (3/30/09 Tr. at 207.) Indeed, the berms were

so high they caused Deputy Pease to nearly bottom out his SUV. (3/30/09 Tr. at 207.) Thus, according to Deputy Pease, "the neighbors were understandably upset." (3/30/09 Tr. at 207.)

McClelland lives up the road from the Tallises. (3/31/09 Tr. at 292.) On October 28, 2007, the day after the Tallises installed the berms, McClelland heard from Toby Newberry (his caretaker's son) that the Tallises had put berms in the road that were nearly impassable and had damaged multiple vehicles. (3/31/09 Tr. at 295.) McClelland drove his four-wheeler to check out the berms. (3/31/09 Tr. at 296.) At the time, McClelland was seventy-two years old and in poor health. (7/9/07 Tr. at 33-34.)

McClelland testified as follows: McClelland stopped over the berms and had difficulty putting the vehicle back into forward gear. (3/31/09 Tr. at 297.) While he was stopped he saw Tallis leave his porch and start walking toward him. (3/31/09 Tr. at 297-98.) McClelland also saw Wendy Tallis holding a shotgun, which she grabbed when Tallis came charging. (3/31/09 Tr. at 297, 316-17.) Tallis was charging at McClelland with his dog, shouting profanities. (3/31/09 Tr. at 298, 305-06.) This startled McClelland, as he had never spoken to Tallis up to this point. (3/31/09 Tr. at 298.)

McClelland was worried that Tallis was going to injure him. (3/31/09 Tr. at 298.) He got off his four-wheeler to try to face Tallis off at the fence to prevent

Tallis from hurting him. (3/31/09 Tr. at 298.) The Tallises' fence post had a "slow" sign on it, which McClelland hit twice with his cane and then tried to remove with his hands, in an effort to keep Tallis away from him. (3/31/09 Tr. at 299.) McClelland also walked up and down about three pole lengths of the fence to try to keep Tallis from coming across. (3/31/09 Tr. at 300, 306-07.)

McClelland further testified: Tallis was inebriated and cursing; both men were hollering at each other. (3/31/09 Tr. at 300.) A fence separated the men. Tallis tried to come through the fence at McClelland. (3/31/09 Tr. at 300.) At that point, McClelland swung his cane at Tallis to prevent him from coming through the fence at him. (3/31/09 Tr. at 301.) The cane hit the wire on top, sending the cane's rubber stopper flying. (3/31/09 Tr. at 301.) McClelland didn't realize he had hit Tallis, if he did, and surmised that Tallis may have hit his head on the insulator on the fence post. (3/31/09 Tr. at 301, 303, 339.) McClelland went to pick up the rubber stopper and Wendy Tallis threatened him with the shotgun. (3/31/09 Tr. at 301-02.) McClelland eventually was able to get the four-wheeler started and drove away. (3/31/09 Tr. at 302-03.) McClelland called 911 and was very agitated and had elevated blood pressure after the incident, as confirmed by his caretaker Helen Newberry. (3/31/09 Tr. at 285-87, 317.) McClelland explained that any apparent inconsistencies in his prior statement to the police, e.g., whether Tallis actually came through the fence or only tried to, were the result

of Deputy Pease yelling in McClelland's face and McClelland's elevated blood pressure. (3/31/09 Tr. at 320.)

In contrast, Tallis testified as follows: On the evening of October 28, 2007, Tallis was on his porch when he saw the four-wheeler drive down the road, turn around, and park on a berm. (3/30/09 Tr. at 112.) Tallis claimed that McClelland had hit the sign with his cane, then grabbed it and ripped it off with his hands, which is when Tallis started walking off the porch towards him. (3/30/09 Tr. at 113-14.) Tallis walked down to the four-wheeler with a "purposeful" walk. (3/30/09 Tr. at 113.) Tallis told McClelland he was trespassing and to get off his property. (3/30/09 Tr. at 118.) McClelland yelled back that Tallis did not own the property that McClelland was standing on. (3/30/09 Tr. at 119.) Both men were yelling. (3/30/09 Tr. at 147.) Tallis claimed he turned towards the sign and then McClelland hit him in the head with his cane. (3/30/09 Tr. at 119.)

Tallis claimed he never threatened McClelland or tried to go through the fence. (3/30/09 Tr. at 120.) Tallis then swore at McClelland and told McClelland to get off his property. (3/30/09 Tr. at 121.) Tallis claimed McClelland then tried to tear a fence post down, then picked up a rock (at which point Tallis called to his wife to get the shotgun) but threw the rock down, then walked back to his four-wheeler and left. (3/30/09 Tr. at 121-22.)

Wendy Tallis, Tallis's wife, corroborated Tallis's version of events. She testified that she heard her husband arguing with someone. (3/30/09 Tr. at 181.) She then saw McClelland hit the slow sign with his cane and then rip the sign off with his hands. (3/30/09 Tr. at 181.) She testified that her husband walked through the yard to get to McClelland, telling him that he was trespassing and needed to leave. (3/30/09 Tr. at 183.) She said McClelland then took his cane and hit her husband with it. (3/30/09 Tr. at 183.) She claimed her husband never tried to go through the fence. (3/30/09 Tr. at 186.) She further testified that McClelland grabbed one of the T-posts, but didn't know whether he was trying to pull it out, and then stepped through wire on another fence, picked up a rock, dropped it, then got on his four-wheeler. (3/30/09 Tr. at 187.) She said her husband asked her to get the shotgun sometime after he was hit in the head, probably when McClelland went through the wire on the other fence. (3/30/09 Tr. at 188.) She did not go get the shotgun. (3/30/09 Tr. at 188.)

A.T., the Tallis's daughter, was fourteen at the time of the incident. (3/30/09 Tr. at 228.) She testified that she saw her dad and McClelland arguing at the fence, saying hurtful things. (3/30/09 Tr. at 233.) She saw McClelland hit her dad with his cane, then walk over to one of the T-posts and try to remove it. (3/30/09 Tr. at 233.) She saw McClelland pick up a rock, drop it, then walk back to his four-

wheeler and leave. (3/30/09 Tr. at 234.) She claimed her father never tried to come through the fence. (3/30/09 Tr. at 236.)

Corinne Anderson, a neighbor, also testified for the State. She had been with her partner and Toby Newberry that day. (3/30/09 Tr. at 251.) She was sitting on her porch and saw McClelland arrive on his four-wheeler. (3/30/09 Tr. at 251, 254.) She testified that Tallis and McClleland exchanged bad words and McClelland ripped the "slow" sign down. (3/30/09 Tr. at 252-53.) She could tell the men were yelling at each other back and forth; Tallis approached the fence and McClelland hit him with the cane. (3/30/09 Tr. at 253.) Anderson did not see McClelland pick up a rock nor mess with the fence. (3/30/09 Tr. at 258.) She stopped watching after McClelland hit Tallis with the cane. (3/30/09 Tr. at 258.) Anderson further testified that she had been subpoenaed, she had no "dog in this fight," and it caused hard feelings with Toby Newberry that she testified. (3/30/09 Tr. at 259.)

Anderson further testified that she never saw Tallis attempt to go through the fence. (3/30/09 Tr. at 257.) She said she never observed Tallis do anything threatening towards McClelland. (3/30/09 Tr. at 260.) She also claimed she never told anyone that she saw Tallis start to duck under the fence. (3/30/09 Tr. at 264.) The prosecutor repeatedly emphasized Anderson's testimony in his closing argument. (3/31/09 Tr. at 355-57, 359.)

SUMMARY OF ARGUMENT

McClelland's trial was a credibility contest: his word against that of four State witnesses, all of whom testified consistently with each other and against McClelland, including as to the central issue of his affirmative defense---whether Tallis acted in a way to cause McClelland to reasonably believe force was necessary to defend himself. Defense counsel failed to secure and present the testimony of Sue Swenson, a neighbor, as to a prior inconsistent statement by a key State witness that went to the heart of McClelland's justifiable use of force defense. Counsel's deficient performance prejudiced McClelland.

McClelland was also prejudiced by the district court's preclusion of cross-examination of Wendy Tallis on conduct underlying her conviction for improper issuance of bad checks, which related to her truthfulness. The preclusion was an error under Rule 608(b). It also violated McClelland's right to confrontation, which error this Court should notice on plain error review. In the alternative, McClelland was deprived of effective assistance of counsel if defense counsel failed to adequately raise these issues.

Moreover, the cumulative effect of these errors--both of which deprived McClelland of key evidence to impugn the credibility of two witnesses and undermine the credibility of all the State witnesses--rendered his defense far less persuasive and deprived him of a fair trial.

ARGUMENT

I. MCCLELLAND WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO SECURE AVAILABLE TESTIMONY TO IMPEACH A KEY STATE WITNESS.

The actions of McClelland's trial counsel (defense counsel) prevented McClelland from presenting the testimony of Sue Swenson as to Corinne Anderson's prior inconsistent statement that went to the heart of McClelland's defense. Trial counsel's performance was deficient and prejudiced McClelland.

A. Standard of Review

Ineffective assistance of counsel claims are mixed questions of law and fact which this Court reviews *de novo*. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

B. Relevant Facts

On the morning of the first day of trial, trial counsel told the district court and the State that over the weekend he contacted Swenson, a neighbor, "who, if allowed to, would testify in our case in chief that she had a conversation with Corinne Anderson the day this occurred and that Corinne Anderson advised her she witnessed the whole altercation and that she did see Mr. Tallis begin to duck under the fence and that's when he was hit with the cane." (3/30/09 Tr. at 9.) This statement completely contradicted Anderson's pre-trial statement and trial

testimony that at no time did Tallis duck under the fence or in any way threaten McClelland.

Trial counsel knew about Swenson for some time: "I knew that she lived in the area, and she had talked to Bill Buzzell [defense investigator] at one time early on, gave an indication that she didn't want to testify." (3/30/09 Tr. at 9.) Trial counsel continued: "It's been my experience with recalcitrant witnesses, I guess, that they usually don't serve much purpose." (3/30/09 Tr. at 9.)

Trial counsel then explained that "[w]hen the state interviewed Ms. Anderson in March, earlier this month, and this story came out" that she did not see Tallis try to duck under the fence, he attempted to again contact Swenson by phone but was not able to reach her until March 29, 2009, the day before trial. Swenson told him that she was somewhat reluctant to come to court but that she would testify if allowed. (3/30/09 Tr. at 9.) She is a caretaker for an elderly person and needed to make arrangements for that obligation. (3/30/09 Tr. at 9.)

The State opposed the defense calling Swenson unless State counsel had an opportunity to interview her prior to her testimony. (3/30/09 Tr. at 11.) Both State and defense counsel spoke with Swenson and made an appointment for her to be interviewed by the prosecutor at 8:30 on the morning before the second day of trial, but Swenson had not shown up by 8:50 a.m. (3/31/09 Tr. at 273.) Defense counsel stated that he would still like to call Swenson if she shows up, but the

district court disallowed her as a witness, finding it would be unfair to the State for her testify because the State had not had the chance to interview her in advance. (3/31/09 Tr. at 273-74.) Accordingly, Swenson was not allowed to testify.

Swenson later testified at McClelland's sentencing hearing. When asked by defense counsel what Anderson told Swenson after the incident, State counsel objected to the testimony as irrelevant: "If that testimony was relevant, it should have been brought up at trial, Judge. There was an opportunity for that." (7/9/09 Tr. at 16.) As Swenson interjected, however, she "did not have an opportunity" to so testify at trial. (7/9/09 Tr. at 16.) After the court questioned whether defense counsel was trying to collaterally attack the conviction, defense counsel withdrew the question. (7/9/09 Tr. at 16.)

C. Discussion

The Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, and Article II, Section 24 of the Montana Constitution guarantee a defendant's right to effective assistance of counsel. When analyzing an ineffective assistance of counsel claim, this court applies the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Kougl*, ¶ 11. Accordingly, a defendant "must demonstrate that (1) counsel's performance was deficient or fell below an objective standard of reasonableness, and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for

counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal quotation marks omitted).

This Court will review an ineffective assistance of counsel claim on direct appeal where the record reveals why counsel acted as he did or where there is no plausible tactical justification for the attorney's action or omission. *Kougl*, ¶¶ 14-15.

Defense counsel failed to disclose Swenson as a potential defense witness, or otherwise secure her testimony. On January 5, 2009, defense counsel had not responded to any of the State's discovery requests, prompting the State to file a motion for discovery. (D.C. Doc. 21 at 19, 21.) On January 27, 2009, the district court granted the motion, entering an order requiring the defense to provide discovery, including the names of all witnesses. (D.C. Doc. 20.) As of February 26, 2009, defense counsel still failed to respond, requiring the State to request a discovery hearing. (D.C. Doc. 21.) The court held a discovery hearing on March 4, 2009. During the hearing, defense counsel stated that the sole defense witness would be McClelland's caretaker (Helen Newberry). (3/4/09 Tr. at 3.) Counsel did not mention Sue Swenson as a potential witness (although counsel did mistakenly refer to McClelland's caretaker as "Sue"). (3/4/09 Tr. at 3.)

Defense counsel was aware of Swenson and her testimony "early on." (3/30/09 Tr. at 9.) Nevertheless, counsel failed to disclose her as a defense

witness, because she had expressed some reservation about testifying. (3/30/09 Tr. at 9.) However, there was no reason not to list Swenson as a potential witness. Montana law required McClelland to timely disclose his witnesses. Mont. Code Ann. § 46-15-323. And, should counsel later have decided for tactical reasons not to call Swenson or should Swenson have failed to appear, the State would have been prohibited by Mont. Code. Ann. § 46-15-325 from commenting on the failure to call her. Thus, there was no downside to at least listing Swenson as a witness. By failing to disclose her in a timely manner, defense counsel foreclosed the opportunity to call her.

Defense counsel expressed concern that Swenson would be a "recalcitrant" witness. Were this really true, counsel could have secured her testimony through a deposition. Mont. Code Ann. § 46-15-201. Or, at the very least, counsel could have sought a subpoena. Mont. Code Ann. § 46-15-101. There was no reason to assume she would fail to comply with a subpoena and risk contempt of court. *See* Mont. Code Ann. § 46-15-329(3). Indeed, the law provides these remedies to ensure a criminal defendant has available to him the testimony he needs, even from hesitant witnesses.

Moreover, the critical nature of Swenson's testimony became even more apparent by March 10, 2009, when the State disclosed the transcript of its interview of Anderson, which revealed that Anderson was now claiming never to

have seen Tallis try to duck under the fence toward McClelland--in contrast to her prior statement and in contravention of McClelland's affirmative defense. (D.C. Doc. 44 at 3.) Surely at this point it was incumbent upon counsel to take immediate action to disclose Swenson as a witness. Nothing precluded counsel from doing so. As late as March 6, 2009, the State disclosed two new witnesses, A.T. and Anderson. (D.C. Doc. 36 at 3; D.C. Doc. 45 at 2.) The district court allowed the State witnesses over the defense's timeliness objection. (D.C. Doc. 44; D.C. Doc. 50 at 4-6.) Certainly at that point defense counsel should have disclosed Swenson. Since counsel was having difficulty reaching her by phone, he should have sought a subpoena in the meantime. By once again failing to do so, counsel again foreclosed the opportunity to call her as a witness.

As of at least March 10, 2009, it was apparent how critical Swenson's testimony would be. Anderson was the sole unbiased witness the State would present as to the critical events of the assault and McClelland's justifiable use of force defense. Defense counsel's belated efforts to reach Swenson by telephone to get her to voluntarily appear fell short of professional judgment. Counsel was not limited to her voluntarily appearing, and he failed to utilize the remedies available to secure her appearance. Moreover, the law was clear that failure to timely disclose Swenson could result in the defense being precluded from calling her as a witness. Indeed, that is what occurred.

Defense counsel's actions and failings resulted in the defense not being able to call a critical witness to impeach the credibility of a State witness with her prior inconsistent statements as to a central disputed fact. Counsel's performance falls below an objective standard of reasonableness when he fails to impeach a government witness with prior inconsistent statements whose testimony is critical to the government's case. *E.g.*, *Driscoll v. Delo*, 71 F.3d 701, 709-10 (8th Cir. 1995); *Moffett v. Kolb*, 930 F.2d 1156, 1157, 1161-62 (7th Cir. 1991); *Nixon v. Newsome*, 888 F.2d 112, 115-16 (11th Cir. 1989); *Smith v. Wainwright*, 799 F.2d 1442, 1443-44 (11th Cir. 1986); *United States v. Tucker*, 716 F.2d 576, 585-86 (9th Cir. 1983).

By failing to take steps to disclose Swenson as a witness in a timely manner and to secure her attendance at the trial or testimony by deposition, counsel's performance was deficient under the first *Strickland* prong.

Under the second *Strickland* prong, McClelland must "establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal quotation marks omitted). Prejudice may be found where counsel fails to use a prior inconsistent statement to impeach a witness whose testimony is critical to the government's case and whose credibility is therefore important. *E.g.*, *Driscoll*, 71

F.3d at 710-11; *Moffett*, 930 F.2d at 1162 (7th Cir. 1991); *Nixon*, 888 F.2d at 116-17; *Smith*, 799 F.2d at 1444; *Tucker*, 716 F.2d at 593.

Here, Anderson was the State's only unbiased witness. Whereas the Tallises all had an interest in Mathias Tallis not being seen as the aggressor and an interest in maintaining a consistent story, Anderson had no such interest or motive. Anderson was a neighbor of both the Tallises and McClelland. (3/30/09 Tr. at 245-46.) To the extent she had any bias, it would have been in favor of McClelland because she was friends with the son of McClelland's caretaker. (3/30/09 Tr. at 247.) She was only acquaintances with the Tallises. (3/30/09 Tr. at 248.) Anderson was portrayed as having no reason to favor the Tallises or the State, indeed as though her credibility were unassailable. As the prosecutor emphasized in his closing statement, Anderson had "no dog in this fight." (3/31/09 Tr. at 355.) She was "just trying to tell you the truth of what happened that day"; she is "not a family member, just a neighbor, knows both sides of this, and she's saying that Mr. Tallis never climbed through the fence . . . ." (3/31/09 Tr. at 355-56.)

Anderson's testimony went to the heart of McClelland's affirmative defense, assuring the jury that at no time did Tallis threaten McClelland or give him reason to fear for his safety. Yet, Anderson had given a prior inconsistent statement, on the very day of the incident, that completely contradicted her trial testimony on the

issue of whether Tallis had advanced toward McClelland through the fence or not. But, because counsel failed to secure the testimony of Swenson, the jury was not presented with the prior inconsistent statement and was left with no reason to doubt Anderson's credibility on a central issue of the case. *See Smith*, 799 F.2d at 1444 (finding prejudice where prior inconsistent statement of key eyewitness was not used to impeach witness and witness's credibility was the central issue of the case).

Moreover, the other evidence against McClelland was not nearly as strong. As the prosecutor pointed out to the jury during his closing remarks, the case came down to the credibility of the State witnesses against McClelland's. (3/31/09 Tr. at 354-58.) The only other eyewitnesses to the events were the Tallises. And, as the State acknowledged in its closing remarks, the Tallises all had an interest in the outcome of the case. (3/31/09 Tr. at 356-57.) But, as the prosecutor further emphasized, Anderson had no such interest. (3/31/09 Tr. at 357.) The prosecutor repeatedly invited the jury to rely on Anderson's credible testimony. (3/31/09 Tr. at 356-57, 359.)

Indeed, he proclaimed that Anderson "put[] the crowning blow" on McClelland's assertion of justifiable use of force and reminded the jury they could rely on solely her testimony undermining McClelland's defense. (3/31/09 Tr. at 355, 359 ("Matt Tallis didn't go through the fence. You can believe Corinne

Anderson on that if you want to. You don't need a whole lot of evidence or DNA or blood or videos if you believe the credibility of one witness.").)

Moreover, Anderson's testimony served to bolster the credibility of the Tallises. Indeed, the prosecutor went so far as to emphasize the fact that Anderson has been "very consistent with everything that" the Tallises said. (3/31/09 Tr. at 357.) Thus, Anderson not only provided unimpeached evidence that went to the heart of McClelland's defense, she "alter[ed] the entire evidentiary picture" by bolstering the credibility of the Tallises and allowing the jury to deduce that the Tallises were also telling the truth. *See Strickland*, 466 U.S. at 695-96 ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture . . . ."). Thus, the credibility of all the State's eye-witnesses--the Tallises and Anderson--were improperly bolstered. *See Whelchel v. Washington*, 232 F.3d 1197, 1208 (9th Cir. 2000) (noting the bolstering effect of consistent testimony: "Each of the four tended to corroborate the others, thereby bolstering the credibility of each.").

Courts will find prejudice where a conviction rests on the credibility of eye-witnesses whose credibility was improperly bolstered, and here, the credibility of all the State eyewitness was improperly bolstered by Anderson's unimpeached testimony. *See e.g.*, *Whelchel*, 232 F.3d at 1208 (finding that videotaped statements admitted in violation of the Confrontation Clause were prejudicial

where they served to bolster the credibility of eyewitness co-defendants whose credibility otherwise was suspect); *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (1998) (finding no harmless error where district court erroneously admitted evidence of one Border Patrol Officer's opinion as to the credibility of another Border Patrol Officer, where defense's self-defense theory rested on the jury disbelieving the latter Officer).

The bolstering effect of Anderson's testimony on the Tallises' credibility carries even more prejudicial weight in light of the erroneous ruling prohibiting McClelland from impeaching Wendy Tallis (discussed below).

Clearly the prosecutor recognized the critical importance of Anderson's testimony, and repeatedly emphasized it in his closing remarks. (3/31/09 Tr. at 355-57, 359.) This case came down to the credibility of the State's witnesses over McClelland's. Defense counsel's failure to secure the testimony of the one witness who could have impeached the State's star witness as to the central issue of McClelland's defense prejudiced McClelland. There is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different," and accordingly the second *Strickland* prong is met. *Kougl*, ¶ 11 (internal quotation marks omitted).

Finally, this claim is properly before this Court because the reasons for counsel's actions, or lack thereof, appear on the record. *Kougl*, ¶ 14. This is not a

case where we do not know why counsel failed to secure a witness's testimony. *E.g.*, *Soraich v. State*, 2002 MT 187, ¶¶ 24-25, 311 Mont. 90, 53 P.3d 878 (record did not explain why counsel failed to call witness whose testimony counsel had promised during the opening statement). Rather, the explanation for defense counsel's failure to secure and present Swenson's testimony appears on the record. Defense counsel initially failed to disclose Swenson as a witness because he thought she was hesitant to testify and he believed recalcitrant witnesses usually are not helpful. (3/31/09 Tr. at 9.) Even after learning that Anderson intended to testify against McClelland's affirmative defense, counsel failed to disclose Swenson or seek a subpoena because he could not reach her on the telephone. (3/31/09 Tr. at 9.) It was only once he did reach her by phone that he finally disclosed her as a witness--the morning of trial. Although the State agreed she could testify if it could interview her the next morning, she failed to appear--without repercussion, since there was no subpoena requiring her attendance.

In the alternative, this claim is properly before this Court because no plausible justification exists for counsel's actions and failure to secure Swenson's testimony. *See Kougl*, ¶ 15. This is not a case where an attorney declined to call certain witnesses as a matter of strategy. *See Weaver v. State*, 2005 MT 158, ¶ 19, 327 Mont. 441, 114 P.3d 1039 (defense counsel weighed possible exculpatory testimony against "squirrely" characters of possible witnesses and made reasonable

decision that investigation was unnecessary). Rather, defense counsel knew that Swenson's testimony would be important and made the tactical decision to use her testimony to impeach a key State witness, but his failure to timely disclose her as a witness and secure her testimony prevented him from calling her. The law was clear that failure to timely disclose a witness may result in exclusion. Mont. Code Ann. § 46-15-329(4). Defense counsel had "nothing to lose" in disclosing her as a witness or getting a subpoena, given that the State could not negatively comment on the failure to call a witness at trial. Mont. Code Ann. § 46-15-325. And, Swenson's testimony was not cumulative: there were no other witnesses or evidence to impugn Anderson's testimony. There is no plausible justification for counsel's actions; accordingly, this Court can review the claim on direct appeal. *Kougl*, ¶ 22.

McClelland received ineffective assistance of counsel; the effect was to deprive him of the ability to impeach a key State witness whose testimony went to heart of his defense and bolstered the other State witnesses. It deprived McClelland of a fair trial and accordingly he is entitled to a new trial.

II. THE DISTRICT COURT ERRED WHEN IT PROHIBITED MCCLELLAND FROM CROSS-EXAMINING WENDY TALLIS ON HER PRIOR DISHONEST CONDUCT.

The district court prohibited the defense from impeaching Wendy Tallis's credibility by cross-examining her on past dishonest conduct relating to a prior

conviction for improper issuance of bad checks. This was an erroneous ruling under Rule 608(b). It also violated McClelland's right to confrontation under the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution.

A. Standard of Review

Generally, this Court reviews the district court's evidentiary rulings for abuse of discretion. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. However, "to the extent the court's ruling is based on an interpretation of an evidentiary rule or statute, [the Court's] review is de novo." *Derbyshire*, ¶ 19. This Court's review of a constitutional law question, including the right to confront witnesses, is plenary. *State v. Parker*, 2006 MT 258, ¶ 11, 334 Mont. 129, 144 P.3d 831.

B. The Court Erred When It Held That Rule 608(b) Did Not Apply and the Error Was Not Harmless.

The State's motion *in limine* sought to preclude McClelland from mentioning Wendy Tallis's prior criminal history, to wit, her 1998 conviction in Washington State for improper issuance of bank checks. (D.C. Doc. 40 at 1.) McClelland agreed that he could not raise the fact of her prior conviction, but argued that he should be able to raise the conduct itself to raise an issue of her character for truthfulness, citing *State v. Martin*, 279 Mont. 185, 926 P.2d 1380 (1996). (D.C. Doc. 48 at 1.)

Rule 608(b) provides in relevant part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The district court held that "Rule 608(b) is inapplicable here," and on that sole basis granted the State's motion. (D.C. Doc. 50 at 3.) Because the court's ruling was based solely on an interpretation of a Rule of Evidence (not on any discretionary determination of admissibility), this Court's review is *de novo*. *See Derbyshire*, ¶ 19. The district court erred when it determined that the Washington offense of unlawful issuance of a bank check was not probative of truthfulness and was not admissible under Rule 608(b).

In *Martin*, this Court recognized certain criminal acts which involve dishonesty: forgery, bribery, suppression of evidence, false pretenses, embezzlement, and unsworn falsification to authorities. *Martin*, 279 Mont. at 200, 926 P.2d at 1390. This Court has also declined to hold that burglary and theft involve truthfulness. *State v. Gollehon*, 262 Mont. 1, 25, 864 P.2d 249, 259 (1993).

In contrast to simple theft, in Washington the unlawful issuance of bank checks plainly involves dishonesty. By its terms, unlawful issuance of checks in

Washington includes as an element the "intent to defraud." Rev. Code Wash. (ARCW) § 9A.56.060. As the Court of Appeals of Washington has recognized, "[t]he crime of unlawful issuance of a bank check contains as one of its elements intent to defraud. That intent involves dishonesty . . . ." *Washington v. Smith*, 786 P.2d 320, 322 (Wash. App. Div. 3 1990) (holding that a prior conviction for unlawful issuance of a bank check was admissible under Washington's evidentiary rule for convictions involving dishonesty). Black's Law Dictionary defines "defraud" as "[t]o cause injury or loss to (a person) *by deceit*." *Black's Law Dictionary* (Bryan A. Garner ed., 8th ed, West 2004) (emphasis added). In contrast to simple theft or burglary, the Washington crime of improper issuance of bank checks involves, indeed requires, deceit and untruthfulness.

This Court has not addressed whether conduct involving the unlawful issuance of bank checks involves dishonesty. Other jurisdictions, including Washington, have held that issuing a bad check with intent to defraud or knowledge that it will be dishonored does involve dishonesty, for purposes of Federal Rule of Evidence 609 and state analogs, which allow evidence of conviction of crimes involving dishonesty or false statement. *See e.g.*, *United States v. Mejia-Alarcon*, 995 F.2d 982, 989 (10th Cir. 1993) (compiling federal cases); *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652, 655 n.3 (3rd Cir. 1990); *Smith*, 786 P.2d at 322; *Nebraska v. Fleming*, 388 N.W.2d 497 (Neb. Sup.

Ct. 1986) (holding, as a matter of law, that a violation of Nebraska's bad check statute was a crime involving dishonesty or false statement because it requires as an element the intent to defraud); *Children's Palace, Inc. v. Johnson*, 609 So.2d 755, 757 (Fla. Dist. Ct. App. 1st Dist. 1992) ("It is apparent from the plain language of [Florida's] worthless check statute [requiring knowledge the check will be dishonored] that the crime has deceit as its basis."); *cf. United States v. Barb*, 20 F.3d 694, 696 (6th Cir. 1994) (holding that a conviction under Tennessee's bad check statute was not a per se crime of dishonesty because it requires only knowledge the check will be dishonored and does not require intent to defraud).

Wendy Tallis's prior conviction in Washington for improper issuance of a bank check involved dishonesty. The district court erred when it held that Rule 608(b) was inapplicable and disallowed McClelland from cross-examining her on that conduct. Moreover, the error was not harmless.

To determine whether an error in excluding evidence was harmless, this Court applies the harmless error analysis in *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735. *State v. Slavin*, 2004 MT 76, ¶ 19, 320 Mont. 425, 87 P.3d 495 (analyzing under *Van Kirk* whether the exclusion of defense witnesses by the quashing of a subpoena was harmless).

Although not precisely an erroneous exclusion of evidence (but rather, erroneous exclusion of cross-examination about known facts), the most analogous situation for harmless error analysis is the erroneous exclusion of evidence. *See Slavin*, ¶ 19. This type of error was a trial error under *Van Kirk*. *Slavin*, ¶ 20. The error affected the outcome of the trial. This case was a credibility contest that rested entirely on eye-witnesses' conflicting accounts; there was no other direct or circumstantial evidence. Any evidence pertaining to the truthfulness of the witnesses was critical. The State bears the burden to demonstrate that the error at issue was not prejudicial. *Slavin*, ¶ 22. Because the error here was the erroneous exclusion of evidence, "the State must demonstrate there was no reasonable possibility that the exclusion contributed to the conviction." *Slavin*, ¶ 22.

As applied here, the State must demonstrate that there was no reasonable possibility that defendant's inability to cross-examine Wendy Tallis on past dishonest conduct and thus impeach her credibility contributed to McClelland's conviction.

The State cannot meet that burden. Indeed, the jury was instructed to consider "[p]roof that the witness has a bad character for truthfulness," (D.C. Doc. 53 at 4), but McClelland was allowed to elicit no such proof on cross-examination.

And, the excluded evidence was not cumulative; there was no other evidence of Wendy Tallis's penchant for dishonesty. *Compare with Slavin*, ¶ 23-26 (where

district court quashed subpoenas of reporters as to victim's recantations, defendant was able to introduce the same evidence as to the recantations and the probative value of the witnesses' testimony as to the victim's demeanor would have added little or nothing under the circumstances of that case).

Although there was other information on which Wendy Tallis could be impeached, namely her interest in the outcome of the proceedings (Jury Instr. 4, D.C. Doc. 53 at 4), McClelland submits that under *Van Kirk* the Court must compare it qualitatively to the impact the excluded information would have had on her credibility, and the State bears the burden to demonstrate the jury was presented with equally strong impeachment information. *See Van Kirk*, ¶ 47 (holding, as to improperly admitted evidence, "the State must demonstrate that the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence and, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction"). The fact that Wendy Tallis had committed dishonest and deceitful acts in the past for personal gain was a much more specific blow to her credibility, more particularized and damning than the generalized credibility concern raised as to any crime victim. Moreover, the knowledge that Wendy Tallis was willing to be dishonest could have informed the jury's assessment of the credibility of the entire Tallis family, given their mutual

interest in maintaining a consistent story. (Jury Instr. 4, D.C. Doc. 53 at 4 (instructing the jury to consider any motive, bias, or prejudice of the witnesses).)

Had the jury known of Wendy Tallis's deceitful past and willingness to lie for personal gain, it is reasonably likely the jury's assessment of her credibility would have been different. Instead, the jury had little reason to doubt her credibility. Wendy Tallis's testimony also served to bolster the credibility of the other State witnesses with whom she testified consistently. *See Whelchel*, 232 F.3d at 1208. Had McClelland had the opportunity to impeach Wendy Tallis, the jury likely would have re-assessed her credibility and that of the other State eyewitnesses. With Mathias Tallis's interest in not being found to be the aggressor, plus Wendy Tallis's willingness to lie, plus the young daughter's interest in supporting her parents' version of events, the State cannot "demonstrate there was no reasonable possibility that the exclusion contributed to the conviction." *Slavin*, ¶ 22.

C. McClelland's Confrontation Rights Were Violated.

"The right of a defendant in a criminal trial to confront the witnesses against him is contained in the Sixth Amendment to the U.S. Constitution and Article II, Section 24 of the Montana Constitution." *State v. Slade*, 2008 MT 341, ¶ 26, 346 Mont. 271; 194 P.3d 677 (*quoting State v. Wilson*, 2007 MT 327, ¶ 45, 340 Mont.

191, 172 P.3d 1264). The right of confrontation means the "opportunity for *effective* cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

In *Van Arsdall*, the United States Supreme Court held that

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

Van Arsdall, 475 U.S. at 679 (*quoting Davis v. Alaska*, 415 U.S. 308, 318 (1974)) (finding a Confrontation Clause violation where the defendant was prevented from asking the witness during cross-examination about charges that were dropped in exchange for the witness speaking with the prosecutor).

Here, McClelland was prohibited from engaging in otherwise appropriate cross-examination designed to show that Wendy Tallis was a dishonest person and had been dishonest in the past. Under Rule 608(b), Wendy Tallis could properly be impeached on cross-examination based on conduct underlying her conviction for improper issuance of bank checks. The district court erroneously prevented that line of cross-examination which would have exposed an entire basis upon which the jury could determine that Wendy Tallis was not truthful. McClelland's right to confrontation was violated, as a "reasonable jury might have received a significantly different impression of [the witness's] credibility had [his] counsel

been permitted to pursue his proposed line of cross-examination." *Van Arsdall*, 475 U.S. at 680.

McClelland had the opportunity to cross-examine Wendy Tallis, but he was denied the right to *effective* cross-examination. In *State v. Skinner*, 2007 MT 175, 338 Mont. 197, 163 P.3d 399, defendant contended on appeal that his confrontation right was denied when he was prevented from impeaching a witness with a prior inconsistent statement. This Court held that defendant "was given an opportunity to and in fact did cross-examine the detective. Therefore, the issue is not constitutional in nature but evidentiary, which we review for an abuse of discretion." *Skinner*, ¶ 45. McClelland respectfully submits this statement misstates Confrontation Clause jurisprudence. As the United States Supreme Court held in *Van Arsdall*, even where a defendant has the opportunity, and does, cross-examine a witness, if he is denied *effective* cross-examination by denial of the opportunity to pursue otherwise appropriate cross-examination to impeach a witness, which might have given the jury a different impression of the witness's credibility, his confrontation rights are violated. *Van Arsdall*, 475 U.S. at 680. *Skinner* should be overruled to this extent. *See also*, *Slovik v. Yates*, 545 F.3d 1181, 1188 (9th Cir. 2008) (granting habeas petition where the trial court prevented counsel from asking questions on cross-examination to establish that a prosecution witness lied under oath, and finding the California Court of Appeal

"simply applied the wrong standard" when it approved the evidentiary ruling under the California evidence rule allowing discretionary exclusion of evidence and failed to analyze it under the Confrontation Clause).

The error was not harmless. This Court applies the *Van Kirk* harmless error analysis (discussed above) to errors relating to the confrontation right of Article II, Section 24 of the Montana Constitution. *E.g.*, *State v. Russette*, 2008 MT 413, ¶ 21, 25, 347 Mont. 285, 198 P.3d 791. Harmless error analysis also applies to federal Confrontation Clause errors under the Sixth Amendment to the United States Constitution. *Van Arsdall*, 475 U.S. at 684. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684. Relevant factors include, but are not limited to, "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684. Applying these factors, the federal Confrontation Clause error also was not harmless.

First, Wendy Tallis's testimony was important to the prosecution's case: she was one of four eyewitnesses, upon whom the State's case rested. Second, her testimony was not cumulative. A witness's testimony is cumulative when "an effective cross-examination would not have undermined the State's case." *Fowler v. Sacramento County Sheriff's Dep't*, 421 F.3d 1027, 1042 (9th Cir. 2005) (finding a Confrontation Clause violation was not harmless where defendant was not allowed to cross-examine key government witness on credibility issue). Had McClelland been able to impugn her credibility, it would have caused the jury to reassess the credibility of all the State witnesses with whom she testified consistently.

Third, her testimony was contradicted by McClelland's. It was corroborated by Anderson, but, as discussed above, McClelland was denied the right to impeach her with a prior inconsistent statement; it was also corroborated by her husband and daughter, but impugning Wendy Tallis's credibility would have also impugned their credibility, at least somewhat, because of their mutual interest in the outcome of the case and in testifying consistently. *See Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (finding no harmless error where defendant not allowed to cross-examine witness on information relating to her motivation where her testimony was partially corroborated by another witness "whose impartiality would also have been somewhat impugned" by that information). Fourth, McClelland had no other

specific, particularized basis upon which to cross-examine Wendy Tallis as to her character for truthfulness. Fifth, the State's case was not particularly strong, resting as it did on the credibility of four eyewitnesses, whom, as discussed, McClelland was denied the opportunity to impeach. Had McClelland been able to impugn Wendy Tallis's credibility, it would have painted a very different evidentiary picture. Moreover, this prejudice was only compounded by McClelland's inability to impeach Corinne Anderson (discussed above).

Finally, McClelland respectfully requests this Court notice this error on plain error review. Under plain error review, this Court "may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the § 46-20-701(a), MCA, criteria, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996).

The right to confrontation, which appears in the Declaration of Rights, is a fundamental right. *See Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) (a right is fundamental if found in the Declaration of Rights). McClelland was convicted because the jury found the State eyewitnesses more

credible than he; his inability to impugn the State witnesses' credibility, in violation of his confrontation rights, leaves unsettled the question of the fundamental fairness of the trial, especially when considered with the prejudice caused by the ineffective assistance of counsel McClelland received resulting from his inability to impeach Anderson.

III. IN THE ALTERNATIVE, MCCLELLAND WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

McClelland submits in the alternative that he was denied effective assistance of counsel as to the issue of cross-examination of Wendy Tallis on her prior dishonest conduct.

McClelland respectfully submits that defense counsel sufficiently presented to the district court the issue of the permissibility of cross-examination of Wendy Tallis on her dishonest conduct underlying her conviction for unlawful issuance of bank checks. *See e.g.*, *State v. Butler*, 272 Mont. 286, 290-91, 900 P.2d 908, 910-11 (1995) (holding defendant sufficiently raised the issue of his Fifth Amendment right against self-incrimination, even though he did not cite the Fifth Amendment or specific caselaw, when he informed the district court of misgivings over having to admit guilt before undergoing sexual offender evaluation and treatment).

Nevertheless, in its order holding that Rule 608(b) was inapplicable to Wendy Tallis's conviction, the district court stated that "[d]efendant has not shown how the improper issuance of bank checks is an indicator of dishonesty." (D.C.

Doc. 50 at 3.) Thus, should the State contend and the Court determine that McClelland did not sufficiently present the issue to preserve it for appeal, McClelland argues in the alternative that defense counsel was ineffective for failing to properly present the issue and "show[] how the improper issuance of bank checks is an indicator of dishonesty." Counsel determined that he would seek to impeach Wendy Tallis based on the conduct underlying her prior conviction (or at least, preserve the opportunity by opposing the State's motion *in limine* to exclude all mention of the offense). Having done so, there is no plausible explanation for failing to fully argue why the conduct underlying her offense was admissible under Rule 608(b). Counsel failed to cite the applicable Washington statute or cases holding that a conviction for passing bad checks relates to dishonesty. By failing to investigate the applicable law, counsel's performance fell below reasonable professional standards. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations . . . ."); *State v. Becker*, 2005 MT 75, ¶ 19, 326 Mont. 364; 110 P.3d 1 (counsel must research and evaluate applicable charging statutes).

Relatedly, defense counsel was deficient for failing to research and present the argument that prohibiting him from cross-examining Wendy Tallis on her prior dishonest conduct violated McClelland's confrontation rights. Defense counsel's failure to investigate and present a Confrontation Clause argument as an alternative

basis on which the district court should have allowed such cross-examination of Wendy Tallis fell below professional standards. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations . . . ."); *Becker*, ¶ 19 (counsel must research and evaluate applicable charging statutes). Confrontation Clause jurisprudence as set forth above was clear that the failure to allow the defense to cross-examine a witness on an issue going to her credibility infringes this constitutional right. The state and federal right to confrontation provided not only an alternative basis, but a broader basis, on which to allow cross-examination of the evidence. *See e.g.*, *Slovik*, 545 F.3d at 1188 (cross-examination that was excluded under California evidentiary rule as an exercise of court's discretion should have been allowed under the right to confrontation).

Because there is no plausible explanation for trial counsel's failure to argue these points, this Court may review it on appeal. *Kougl*, ¶¶ 14-15. Moreover, because there is no plausible explanation for the failure, counsel's performance was deficient and fell below an objective standard of reasonableness; accordingly, the first prong of the *Strickland* test is met. *Kougl*, ¶ 24. The second prong of the *Strickland* test, prejudice, also is met. Had trial counsel sufficiently argued that the conduct underlying a conviction for improper issuance of bad checks involved dishonesty and therefore was admissible under Rule 608(b), and that the right to confrontation required cross-examination on this basis, the district court would

have allowed McClelland to impeach Wendy Tallis's credibility. The district court's determination to exclude the evidence was based solely on a legal determination that Rule 608(b) did not apply; the district court did not find as a discretionary matter that the evidence should be excluded. (D.C. Doc. 60 at 3.) Accordingly, McClelland could have used the evidence to impeach Wendy Tallis. And as discussed above, because of the central role that witness credibility played in the trial, there is a reasonable probability that, but for counsel's error, the result of the sentencing proceeding would have been different. *Kougl*, ¶ 25.

IV. THE CUMULATIVE ERRORS DEPRIVED MCCLELLAND OF A FAIR TRIAL.

"The doctrine of cumulative error requires reversal of a conviction where a number of errors, taken together, prejudice a defendant's right to a fair trial." *State v. Ferguson*, 2005 MT 343, ¶ 126, 330 Mont. 103, 126 P.3d 463. "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007), *citing Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). "In cases where there are a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *Alcala v. Woodford*, 334 F.3d 862, 883 (9th Cir. 2003) (citations and quotation marks omitted).

Should the Court determine that neither the district court's error in prohibiting cross-examination of Wendy Tallis to impeach her credibility with prior dishonest conduct, nor defense counsel's ineffective assistance in failing to secure and present testimony to impeach a key State witness, taken individually prejudiced the defense, McClelland submits that, taken together, the prejudice deprived him of a fair trial.

The State presented four eyewitnesses to the incident--the Tallises and Anderson. Because of the district court's error and defense counsel's ineffective assistance, McClelland was unable to impeach the credibility of two of those witnesses. All four witnesses testified consistently as to the major facts in dispute, including whether a shotgun was produced and whether Tallis advanced toward or in any way threatened McClelland, and all contradicted McClelland's testimony as to his affirmative defense. The prosecutor emphasized this fact in his closing statement when arguing that the State witnesses were credible and McClelland was not: "[W]hat you heard this morning from Mr. McClelland is completely different than what you heard from four, five witnesses yesterday"; "And does [McClelland's testimony] sounds consistent with everything else that you heard? And, were the witnesses for the [S]tate sufficiently impeached or challenged in their perceptions? No, I think not"; "How about Corinne Anderson? She kind of

cinches it. She's very consistent with everything that they said." (3/31/09 Tr. at 354, 356-57.)

Where witnesses' credibility is at issue, and those witnesses testify consistently and corroborate each other, each witness tends to bolster the credibility of the other. *See Whelchel* ("Each of the four tended to corroborate the others, thereby bolstering the credibility of each."). Had the jury been presented with evidence impugning two of the four State witnesses's credibility, it is reasonably likely the jury would have re-assessed the credibility not only of Wendy Tallis and Anderson but also of Mathias Tallis and his daughter.

Further, this is not a case where improperly excluded evidence was merely cumulative of other evidence that was introduced or would have added little to the evidence introduced. *Slavin*, ¶ 26. In contrast to *Slavin*, apart from the general credibility issues raised by the Tallises' interest in the outcome of the case, there was no basis to challenge their credibility. And, there was no basis or evidence whatsoever to challenge Anderson's credibility, as the prosecutor emphasized for the jury. *Compare with Slavin*, ¶ 26 ("There was an abundance of evidence introduced in this trial [apart from the excluded evidence] for [defendant] to challenge [the victim witness'] credibility."). McClelland was deprived of the ability to impeach the credibility of two of the State witnesses. And, since all four witnesses testified consistently and the prosecutor used that consistency to bolster

all the witnesses' credibility, the cumulative effect was to allow the State to present the consistent testimony of four credible witnesses against McClelland's testimony. It is simply not the case here that an effective cross-examination of both Wendy Tallis and Anderson "would not have undermined the State's case." *Fowler*, 412 F.3d at 1042 (defining cumulative testimony). Had McClelland been allowed to impeach two of the State witnesses, forcing the jury to re-consider the credibility of all four State eyewitnesses, the State's case would have been much weaker.

This was a credibility contest, pitting the State's eyewitnesses against McClelland. McClelland was deprived of the ability to fully impeach the State eyewitnesses; because this was a credibility contest, this "inability to attack [their] credibility could have been the defense's fatal flaw." *United States v. Adamson*, 291 F.3d 606, 614 (2002) (finding error was not harmless where defendant was precluded from attacking the credibility of a critical government witness with prior inconsistent statement where the jury was faced with a credibility contest). The cumulative impact of the prejudice deprived McClelland of his due process right to a fair trial.

CONCLUSION

McClelland respectfully requests the Court vacate his conviction and remand for a new trial.

Respectfully submitted this ____ day of March, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

JENNIFER A. HURLEY

APPENDIX